IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-387

HARNEY ELIHU HOOPER,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

HARNEY ELIHU HOOPER,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Application for a Writ of Certiorari
to the United States Court of Appeals, Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Harney Elihu Hooper, through his undersigned counsel, respectfully petitions this Honorable Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered on June 19, 1978 in these proceedings numbered 77-5152 of the Docket of the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, officially reported at pages 4998-5001 of the 1978 slip opinions of the Fifth Circuit, has not yet been unofficially reported. A copy of the said opinion is annexed hereto and marked Appendix A.

The ruling of the District Court which forms the basis for this petition was made during the trial of this cause and is not a written opinion.

GROUNDS ON WHICH SUPERVISORY JURISDICTION INVOKED

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on June 19, 1978. A copy thereof is annexed hereto as Appendix B.

A timely petition for rehearing and petition for rehearing *en banc* was denied on August 7, 1978. The denial of rehearing is officially published at page 6722 of the 1978 slip opinions of the Fifth Circuit but has not yet been unofficially published. A copy of the said officially reported denial of rehearing *en banc* is annexed hereto and marked Appendix C. A copy of a letter from the Clerk of the Fifth Circuit Court of Appeals notifying counsel of the denial of rehearing is annexed hereto as Appendix D.

On August 16, 1978, the United States Court of Appeals for the Fifth Circuit granted a motion filed on behalf of petitioner and ordered that the issuance of the mandate of the said Court of Appeals be stayed to

and including September 6, 1978, said stay to continue in force until the final disposition of this case by this Honorable Court, provided that within the period above mentioned there shall be filed with the Clerk of the Fifth Circuit a certificate of the Clerk of this Court that the petition for a writ of certiorari has been filed. A copy of that order has been annexed hereto, marked Appendix E.

Jurisdiction of this Honorable Court to review the judgment and opinion of the Court below upon a petition for a writ of certiorari is conferred by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

The sole question presented by this petition for a writ of certiorari is whether a trial judge, in a jury trial upon charges of violating the Hobbs Act (18 U.S.C. §1951), instruct the jury in a thirteen-count indictment, generally, that an effect on interstate commerce has been shown if the Government's evidence is believed by the jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 3, §2, clause iii of the Constitution, in relevant part, provides:

> The Trial of all Crimes, except in cases of Impeachment, shall be by Jury * * *.

The Fifth Amendment to the United States Constitution, in relevant part, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution, in relevant part, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

Title 18, United States Code, Section 1951, in relevant part, provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined no more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section —
>
> * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

Petitioner was convicted following a jury verdict of thirteen counts of violating the Hobbs Act, 18 U.S.C. §1951, and he appealed. The judgment of the United States District Court for the Eastern District of Louisiana was affirmed by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit denied a timely petition for rehearing and petition for rehearing en banc. The Fifth Circuit, however, stayed the issuance of its mandate pending the timely filing of this petition for a writ of certiorari and the disposition thereof by this Honorable Court.

Five police jurors of St. Charles Parish,[1] Louisiana, and the Parish Administrator of the parish, Mr. Albert D. Laque, were indicted for extortion affecting in-

1 The civil parishes of the State of Louisiana are political subdivisions of the State which are equivalent to counties in the remainder of the States within the United States of America.

terstate commerce by demanding kickbacks, under color of official right, to permit various entities to do business in St. Charles Parish, Louisiana.

Mr. Laque was acquitted of the single count in which he was named. Mr. Hooper, the President of the St. Charles Parish Police Jury,[2] was convicted on all counts.

Prior to the commencement of the trial of this cause, the Trial Court submitted to counsel for all parties its proposed charges to the jury and requested that counsel voice any objections in writing upon a copy of the charge supplied by the Court. Counsel for petitioner Hooper, in objection to the Court's proposed charge finding the existence of an effect on interstate commerce, an essential element of the offense, stated (R. 231, Jury Charge p. 19):

> We believe that the jury is empowered to disagree with the Court's finding of interstate commerce and is not limited to a determination of the credibility of the sources of that evidence. Assuming *arguendo* the Court's position is correct, we respectfully submit that the jury should not be instructed to consider the element proved. This is analogous to the Court's ruling on a motion for a judgment of acquittal. While the Court might determine the evidence, if believed, to be legally sufficient for a conviction, it is improper to so instruct the jury. We find no basis for dis-

2 The Police Jury is the governing body of the parish.

> tinguishing between the treatment of one element or of all elements of the offense.

The Court changed its proposed instruction slightly, to couch it in language purporting to divide the responsibility between the Court and the jury for matters of assessing credibility. (Ibid.)

The Trial Court charged the jury in this case:

> It is the duty of the Court and not the jury to determine whether the Government's evidence, if you believe it beyond a reasonable doubt, established that interstate commerce was affected by the conduct of the defendants so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain Federal Jurisdiction.
>
> In other words, with respect to the interstate commerce aspects of the indictment, you need only to decide whether you believe beyond reasonable doubt the evidence offered by the Government to establish an effect on interstate commerce. Therefore, I charge you that the evidence in this case, if you thus believe it, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants has affected interstate commerce, and thereby sustains the Court's jurisdiction within the scope of the Hobbs Act.

The Court of Appeals found no merit to petitioner's objection that the giving of a charge such as that above

quoted constituted an unconstitutional direction of a guilty verdict on one of the essential elements of the offenses charged. The Court of Appeals rejected petitioner's assertion that there is no certainty that the jury would have found an effect on interstate commerce on all of the counts and applied the "concurrent sentence" doctrine to avoid analyzing the evidence with respect to each of the counts, finding an effect in Count 10 of the indictment which was identical to the effect involved in *Stirone v. United States*, 361 U.S. 212, 215 (1960). (Slip opinion, p. 5000 n. 3.) The issue presented by the appeal to the Court below, however, was not the sufficiency of the evidence to prove an effect on interstate commerce but was, instead, the power of the Trial Judge to generally instruct the jury as to all counts that "It is the duty of the Court and *not the jury* to determine whether the Government's [unspecified] evidence, if you believe it beyond a reasonable doubt, established that interstate commerce was affected by the conduct of the defendants so as to bring the activities of the defendant's within the scope of the Hobbs Act and sustain Federal jurisdiction," followed by the direct charge "that the [unspecified] evidence in this case, if you thus believe it, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants has affected interstate commerce, and thereby sustains the Court's jurisdiction within the scope of the Hobbs Act."

The jurisdiction of the United States District Court for the Eastern District of Louisiana upon these allegations of violations of 18 U.S.C. §1951 existed under 18 U.S.C. §3231.

REASONS FOR ALLOWING THE WRIT

1. The Court Of Appeals Has Decided An Important Question Of Federal Constitutional And Statutory Law In A Way Which Conflicts With Applicable Constitutional Principles Enunciated In The Jurisprudence Of This Court.

This Court, in *Sparf & Hansen v. United States*, 156 U.S. 51 (1895), recognized the principle that directed verdicts of guilty are inconsistent with the Sixth Amendment right to trial by jury. This Court has also determined that the Constitution imposes upon the finder of fact, in this case the jury, the duty to determine the existence of every fact essential to establish the accused's guilt. *In re Winship*, 397 U.S. 358, 364 (1970). While the issue of what constitutes interstate commerce is a question of law, it is the jury's duty to apply the law, as given by the Court, to the facts as the jury finds them to exist or not. The Trial Court, under our constitutional system of jury trial, has neither the power nor the duty "to determine whether the Government's evidence, if [the jury] believe[s] it beyond a reasonable doubt, established that interstate commerce was affected by the conduct of the defendants so as to bring the activities of the defendants within the scope of the Hobbs Act." Yet the Trial Court instructed the jury that "It is the duty of the Court and not the jury" to make such a determination, and it did so: "I charge you that the evidence in this case, if you thus believe it, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants affected interstate commerce."

Whether such alleged "conduct" and "activities" of the defendants occurred might reasonably have been construed under the instructions given to have been left to the jury for determination, the factual issue whether such "activities" or "conduct" "affects" interstate commerce was not. This violated the constitutional principles which prohibit the direction of a guilty verdict.

There can be no doubt that the effect on interstate commerce is an essential element of the offense charged. *Stirone v. United States*, 361 U.S. 212, 218 (1960).

The Fifth Circuit, in deciding this case, relied upon its decision in *United States v. Hyde*, 448 F.2d 851 (5 Cir. 1971), where the Court had previously said with regard to an almost identical instruction of a jury (448 F.2d at 839):

> All of the Hobbs Act cases agree that the court should determine whether the *facts alleged* meet the statutory requirement of affecting interstate commerce. [citations omitted.] This approach is used rather than telling the jury in general terms what it means to affect commerce and allowing the jury to determine whether the facts meet this criterion, because this is a jurisdictional element for which the court has a great responsibility.

In dissenting from the Panel decision in *Hyde, supra*, Judge Rives — we think properly — equated instruc-

tions of the kind here at issue with an unconstitutional partial instructed verdict of guilty, quoting the following language from *United States v. Skinner*, 437 F.2d 164, 165 (5 Cir. 1971):

> A trial court has a wide latitude in commenting on the evidence during his instructions to the jury, but he has no power to direct a verdict of guilty. An instruction deciding a material fact issue as a matter of law adversely to the accused is regarded as a partial instructed verdict of guilty prohibited by the rule just stated.

and from *United States v. Ragsdale*, 438 F.2d 21, 27 (5 Cir. 1971):

> This Circuit is firmly committed to what appears to be a universal rule, that no matter how conclusive the evidence, a court may not direct a verdict of guilt in whole or in part. *United States v. Skinner*, [*supra*]. Any such instruction would amount to plain error which would be noticed even though not assigned. *Mims v. United States*, 375 F.2d 135 (5 Cir. 1967).

(448 F.2d at 855, RIVES, J., *dissenting*.)

The decision in *Hyde* and the case *sub judice* were based upon the following language in *Nick v. United States*, 122 F.2d 660, 673 (8 Cir. 1941), *cert. den.*, 314 U.S. 687, *reh. den.*, 314 U.S. 714 (1942):

> It is not for the jury to determine what is or is not interstate commerce — that is a question of law. It is for the court to charge the jury that *if certain facts covered by the evidence* are shown then there is such interference. This is what the court stated and its statement is proper. (Emphasis added.)

The instruction given in the present case, however, was a "short-hand" formulation of the *Nick* Rule, the brevity of which we submit constituted an unconstitutional direction of a partial guilty verdict. The Court did not summarize the evidence relative to an effect on interstate commerce and instruct the jury that if it believed that evidence beyond a reasonable doubt then, as a matter of law, the evidence was sufficient to prove that essential element. Rather, the Court charged the jury that if it believed the evidence beyond a reasonable doubt then the evidence meets the jurisdictional requirements of 18 U.S.C. §1951. While confusion of the jury is not essential to the petitioner's position herein, it is suggested that the jury might well have inferred from the instruction given that it was required to find the interstate commerce element if it believed beyond a reasonable doubt the evidence adduced to support the extortion element. That the jury might well have so construed its instruction is established by the fact that one of the counts of the indictment involved a fifteen-year-old piece of heavy equipment which had long since left interstate commerce and had come to rest in Louisiana and the alleged extortion was a kickback arrangement between the owner of that piece of heavy equipment and the indicted parish officials to purchase *that* piece of equipment and the drafting of the bid specifications so

narrowly as to exclude every other piece of similar equipment. The equipment at issue had been specially modified. Another count involved a land transaction, which by no stretch of an inventive prosecutorial mind could reasonably have affected interstate commerce.

The problem apparent to petitioner in the application of the *Nick* Rule as done in this case and by several other Circuits purporting to follow it is the jump from the proposition that "what is or is not interstate commerce" is a "question of law" to the assumption that the judge alone determines that such commerce is delayed, obstructed, or affected, or that the movement of some article or commodity in commerce is affected (18 U.S.C. §1951). These latter things, which are essential under the statute, are questions of fact. Traditionally, and we respectfully submit that it is constitutionally required by the jury trial provisions of Article 3, §2 and the Sixth Amendment to the Constitution, the determination of fact questions and mixed questions of law and fact are made by juries upon proper instructions defining the law. That constitutional tradition is emasculated when, as here, the judge determination of credibility of the witnesses on the entire case.

We therefore respectfully submit that the present trend in the various Circuits, of which this case is but one of a few, to allow the trial court to find the essential element of affecting interstate commerce is a substantial constitutional and statutory question under Art. I, §2, the Fifth and Sixth Amendments to the United States Constitution and 18 U.S.C. §1951, which calls for

the exercise of this Honorable Court's power of supervision.

2. The Important Federal Constitutional And Statutory Construction Of The Power Of The Trial Judge To Determine This Essential Element Of A Hobbs Act Prosecution Has Never Been, But Should Be, Decided By This Court.

It was urged by petitioner in the Court below that *Stirone v. United States*, 361 U.S. 212 (1960), which involved a jury determination of the essential element involved here, stood for the proposition that a jury determination of this essential fact is constitutionally required. The Court below pointed out that "*Stirone* involved the narrow question of whether [the defendant] was convicted of an offense not charged in the indictment. Id. at 213." This Court did not consider the precise issue in *Stirone* with which this petition is involved, although substantial *dictum* in the opinion would support petitioner's position. It appears from the research of the parties and the Court below that there is no controlling decision of this Court with respect to the issue presented herein. The question presented is of substantial importance to the administration of Federal criminal justice. If the trial courts of the United States can direct the jury in Hobbs Act cases to find as a matter of law that interstate commerce had been affected if it believes "the evidence" in the case, then what is to prevent the Courts from assuming in the future the power to instruct the jury to find the existence of an essential element which affects jurisdiction, such as the use of the mails (18

U.S.C. §1341), the interstate nature of a fraudulent telegram (18 U.S.C. §1343), the fact of interstate travel (18 U.S.C. §2101), and other statutes (18 U.S.C. §1952, §2312, §2313, §2314, *etc.*) The same Courts which have held that the interstate commerce element under 18 U.S.C. §1951 is a judge — question have uniformly held that the same element under the other cited statutes is a jury question. We can find no rational basis for the distinction in treatment of 18 U.S.C. §1951 prosecutions from every other statute made under Article I, §8 of the Constitution, Interstate Commerce Clause, which warrants the unique importation into the division of power between judges and juries under our constitutional system of jury trials this exceptional practice of permitting judges to bind juries to their determination of the jurisdictional essential element. Therefore, we respectfully urge this Honorable Court to grant this application for a writ of certiorari and undertake to review and decide the constitutionality of the growing practice under 18 U.S.C. §1951 to allow the trial judges to instruct juries in the manner here presented and to thereby bind the jury to the judge's determination of this essential jurisdictional element of a prosecution under 18 U.S.C. §1951.

CONCLUSION

For the foregoing reasons, this Court should grant review of the judgment below upon a writ of certiorari directed to the Court below, after which this Court should reverse the convictions on all thirteen counts of the indictment and remand this cause to the United States District Court for the Eastern District of

Louisiana for a new trial comporting with the traditional principles of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. McPherson, a member of the bar of the Supreme Court of the United States, certify that the requisite number of copies of the foregoing Petition for a Writ of Certiorari have been served on the Solicitor General of the United States by mailing three copies of same to him at his office in Washington, D.C., this ____ day of September, 1978.

All parties required to be served have been served.

JAMES A. McPHERSON
Attorney at Law

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

versus

Harney Elihu HOOPER, Jr.,
Defendant-Appellant.

No. 77-5152.

United States Court of Appeals,
Fifth Circuit.

June 19, 1978.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, AINSWORTH and VANCE, Circuit Judges.

AINSWORTH, Circuit Judge:

Defendant Harney Elihu Hooper, Jr., president of the police jury in St. Charles Parish, Louisiana, was charged with using his political office to obtain money from various businesses that were operating or seeking to operate in the Parish. Hooper was convicted of twelve counts of extortion and one count of conspiracy

in violation of the Hobbs Act, 18 U.S.C. § 1951.[1] Three issues are raised on his appeal which he claims require reversal of his conviction. First, defendant contends that the district court erred in instructing the jury that an effect on interstate commerce had been shown if the Government's evidence was believed. Second, Hooper asserts that the trial court abused its discretion in refusing to allow him and a codefendant more than a joint total of ten peremptory challenges. Finally, defendant urges that the district court committed error by furnishing the jury with a written copy of the jury charges. After reviewing these issues, we find no error, and affirm the conviction.

The district judge in this case instructed the jury that

> It is the duty of the Court and not the jury to determine whether the Government's

1 The statute provides in relevant part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined no more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section — * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

> evidence, if you believe it beyond a reasonable doubt, established that interstate commerce was affected by the conduct of the defendants so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain Federal jurisdiction.
>
> In other words, with respect to the interstate commerce aspects of the indictment, you need only to decide whether you believe beyond reasonable doubt the evidence offered by the Government to establish an effect on interstate commerce. Therefore, I charge you that the evidence in this case, if you thus believe it, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants has affected interstate commerce, and thereby sustains the Court's jurisdiction within the scope of the Hobbs Act.

Defendant relies on the Supreme Court's decision in *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) in contending that this instruction improperly took the issue of the effect on interstate commerce away from the jury. Such reliance is misplaced, as *Stirone* involved the narrow question of "whether [the defendant] was convicted of an offense not charged in the indictment." *Id.* at 213, 80 S.Ct. at 271. In *United States v. Hyde*, 5 Cir., 1971, 448 F.2d 815, 834-43, *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972), this court considered the propriety

of an almost identical instruction,[2] and concluded that

> [a]ll of the Hobbs Act cases agree that the court should determine whether the facts alleged meet the statutory requirement of affecting interstate commerce. [citations omitted] This approach is used rather than telling the jury in general terms what it means to affect commerce and allowing the jury to determine whether the facts meet this criterion, because this is a jurisdictional element for which the court has a great responsibility.

Id. at 839. This reasoning is appropriate in the present case, and we therefore reject defendant's contention.[3]

---

2 The district court's charge to the jury in *Hyde* included this language:

> Now, Ladies and Gentlemen of the Jury, it is the duty of the Court and not the jury to determine whether the government's evidence, if believed, established that interstate commerce was affected by the conduct of the defendant so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain federal jurisdiction. I instruct you that if you find from the evidence beyond a reasonable doubt, that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment, and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected.

Id. at 841 n. 35.

3 Defendant claims that there is no certainty that the jury would have found an effect on interstate commerce on all of the counts. We note that the effect on interstate commerce need not be substantial, *see United States v. Nadaline*, 5 Cir., 471 F.2d 340, 343, *cert. denied*, 411 U.S. 951, 93 S.Ct. 1924, 36 L.Ed.2d 414 (1973) ("[[t]he impact of extortion] need affect interstate commerce only in a minimal degree . . . ."); *United States v. Hyde*, 5 Cir., 1971, 448 F.2d 815, 835-36, *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972). There was such a showing of an effect on interstate commerce here. As the sentence for all thirteen counts is to run concurrently, we need only examine the effect on interstate commerce in one count. *See United States v. Parker*, 5 Cir., 1972, 454 F.2d 1164. Count 10, for example, involved extortion of a corporation operating a concrete plant in Louisiana that used materials shipped to the plant from other states. In *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4 L.Ed.2d 252 (1960), the Supreme Court found the requisite effect on interstate commerce under circumstances that are indistinguishable from those involved in Count 10.

Defendant's insistence that the district court abused its discretion by refusing to allow the two codefendants more than ten peremptory challenges is also without merit. In *United States v. Bentley*, 5 Cir., 1974, 503 F.2d 957, 958, this court stated that "[t]he number of peremptory challenges afforded a defendant is governed by F.R.Cr.P. Rule 24(b) and the discretion of the judge." Rule 24(b) provides

> If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

Defendant asserts that the district court abused its discretion because he was placed in an inferior position to that of the Government, since each defendant in effect had only five peremptory challenges compared to the Government's six. Defendant also claims that there was conflict of interest between the two defendants, and that the "dilution" of the peremptory challenges by requiring the defendants to jointly exercise the challenges was therefore prejudicial. We are unconvinced by defendant's reasoning. The two defendants exercised their challenges jointly, and defendant Hooper has not shown that there was any actual conflict between the two defendants as to the use of the peremptory challenges in the jury selection. There was no abridgement of defendant's right to exercise peremptory challenges and no evidence that "the jury as finally selected was other than representative and impartial." *See United States v. Scott*, 5 Cir., 555 F.2d 522, 533, *cert. denied*, ___ U.S. ___, 98 S.Ct. 610, 54 L.Ed.2d 478 (1977) (where four defendants were allowed a total of twelve challenges and the Government was allowed seven).

The final ground of error put forth by defendant is that the district court incorrectly provided the jury with a written copy of the jury charges. In *United States v. Schilleci*, 5 Cir., 1977, 545 F.2d 519, this court expressed disapproval of the practice of furnishing the jury with written copies of the jury charge, but stated, however, that the practice was "not error in itself." *Id.* at 526. As none of the circumstances that

created the risk of prejudice in *Schilleci* is present in this case,[4] we reject defendant's contention.

AFFIRMED.

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4 In *Schilleci* the court explained its dissatisfaction with the practice of furnishing the jury with written instructions:

> It should be noted that the trial judge gave a written copy of his jury charge to each member of the jury to have to follow along as he read, and to carry into the jury room. Thus, the jury had the opportunity to give more consideration to separate portions of the charge, rather than to the total charge; and the jury was not instructed that the charge was to be considered by them as a connected series and viewed as a whole. *Id.* at 524.

The court went on to further explain its holding.

> Other factors combined to compound this error [regarding defendant's ignorance of the law]. First, the charge was submitted to the jury in writing for them to consider during their deliberations. While not error in itself, the practice is conducive to dissection of the charge by the jury and overemphasis of isolated parts rather than consideration of the charge as a whole. Second, the jury was never instructed to consider the charge as an integrated whole. . . . While we are hesitant to rely on any one of the above errors as constituting, in and of itself, reversible error, their combined effect, together with the unique factual situation presented, require reversal of these convictions.

Id. at 526.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5152

D. C. Docket No. CR-76-662 "C"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARNEY ELIHU HOOPER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before BROWN, Chief Judge, AINSWORTH and VANCE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

JUNE 19, 1978

ISSUED AS MANDATE:

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12)

Group 1 — Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2 — Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3 — Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	*Docket Number*	*Date of Denial*	*Citation of Panel Decision*
GROUP 1			
Ford v. Dewitt	77-3299	8/ 7/78	S.D.Tex., 575 F.2d 879
Gordon v. Niagara Machine & Tool Works	76-3675	7/31/78	N.D.Miss., 574 F.2d 1182
N.L.R.B. v. General Services, Inc.	77-2652	7/31/78	N.L.R.B., Ala., 575 F.2d 298
O'Quinn v. Estelle	77-2767	7/31/78	S.D.Tex., 574 F.2d 1208
Rozier v. Ford Motor Co.	76-2848, 77-1929	7/31/78	S.D.Ga., 573 F.2d 1332
U.S. v. Brown	77-5607	8/10/78	M.D.La., 574 F.2d 1274
U.S. v. Hooper	77-5152	8/ 7/78	E.D.La., 575 F.2d 496
Wrenn v. American Cast Iron Pipe Co.	77-2627	8/ 9/78	N.D.Ala., 575 F.2d 544

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
Office of the Clerk
Edward W. Wadsworth
Clerk

August 7, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-5152 — U.S.A. v. HARNEY ELIHU HOOPER, JR.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing on behalf of appellant, Hooper, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ BRENDA M. HAUCK
Deputy Clerk

bmh

cc: Mr. James A. McPherson
Mr. Walter J. Rothschild

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-5152

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARNEY ELIHU HOOPER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

ORDER:

The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including September 6, 1978, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing

of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ROBERT AINSWORTH, JR.
UNITED STATES CIRCUIT
JUDGE